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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BIRENDRA MOHAN SHARMA, ASTRAL HOLDING CORPORATION, FREESIA SHIPPING CORPORATION, SUN LILY MARITIME, INC., DOMAN TANKERS INC., and ZODIAC FINANCE CORPORATION,

Petitioners,

vs.

SKAARUP SHIP MANAGEMENT CORPORATION, OLE SKAARUP, and CHEMICAL BANK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF TO RESPONDENT CHEMICAL BANK'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Chemical Bank's ("Chemical") brief makes no attempt to defend the logic of the result reached by the District Court on the facts of this case. The brief also completely ignores the two principal points made in the petition: (a) that this Court should grant certiorari to clarify to the District Courts that their expanded powers under F.R. Civ. P. 56 cannot be used to abridge basic procedural and constitutional rights, and (b) that after the Celotex trilogy, a total failure to allow a party to be heard or to comply with Rule 56 can never be harmless error. See Jones v. Automobile Insurance Co., 917 F.2d 1528, 1533 & n. 6 (11th Cir. 1990) ("This procedural safeguard [the 10 day notice rule of Fed. R. Civ. P. 56] is even more

valuable in light of [Anderson and Celotex], which had the practical effect of raising the non-moving party's standard to defeat a motion for summary judgment.")

Instead of responding, Chemical attempts to depict the result reached below as nothing more than a minor, routine, evidentiary ruling on a state law issue, which raises no issues deserving of this Court's attention. For the following reasons, such a characterization cannot withstand scrutiny.

1. The Legal Result Produced by the District Court's Rulings Is Inherently Illogical Based Upon the Facts of the Case. The record is clear that two weeks before the agreement at issue was executed, Chemical offered to

release petitioners from all liability in return for the ships (JA33-34). Petitioners rejected this proposal. Thereafter, petitioners obtained the injunction against arrest of the ships, and sought an agreement giving them the opportunity to refinance the vessels. Pursuant to that agreement, petitioners paid $1.2 million for the opportunity to refinance.

The damage ruling affirmed by the Court of Appeals assumed -- as it must -- that the bank breached the agreement and caused petitioners to lose the vessels. Yet, the ruling rewards the bank for that breach by allowing it to keep, without any liability, both the ships and the $1.2 million petitioners paid for the opportunity to keep the ships. Although it assumes a breach

which caused the vessels' loss, the Court's limitation on damages leaves petitioners in a worse position than the one they originally rejected, i.e., without the ships, without any recovery, and without the $1.2 million.

This result makes no sense, and it flowed directly from the failure of the District Court to consider these issues in the context of a trial or a proper Rule 56 motion.

2. The Failure of the District Court to Follow Rule 56 Procedures Resulted in Critical Misunderstandings of the Facts on Appeal. Far from being a minor, evidentiary ruling at a final pre-trial conference, the District Court's total failure to comply with Rule 56 -- or even to hear petitioners -- caused both

that Court and the Court of Appeals to misunderstand the factual underpinnings of petitioners' claims. As the Third Circuit held in In re Paoli Railroad, 916 F.2d 829 (3d Cir. 1990):

> The adversarial process upon which our legal system is based assumes that a fact finder will give the parties an adequate opportunity to be heard; if it does not, it cannot find facts reliably. Thus, the detailed factual record requirement, firmly entrenched in our jurisprudence, requires adequate process at the evidentiary stage, particularly where a summary judgment may flow from it.

Id. at 854 (citations omitted).

Here, because the District Court failed to allow the creation of any evidentiary record, the Second Circuit misunderstood at least seven

basic facts about petitioners' claims (see Petition at 24-34), each of which would have been fully clarified either at a trial or by a proper Rule 56 response.

New York case law makes it clear that a full factual record is necessary to determine whether to award lost profits (see cases cited in Petition at 23). Because the District Court granted summary judgment without a record, the Second Circuit created a blanket rule which is neither fact-sensitive nor consistent with New York law. Chemical's contention that petitioners have conceded that the damage ruling was determinative by suggesting that it should have been certified to the New York Court of Appeals misses the point. That Court

has repeatedly held that the issue of lost profits depends on the facts and, if it accepted a certification, would undoubtedly have rejected the absolute rule announced by the Second Circuit.

3. The Brief, Final Pre-Trial Conference on October 6, 1989 Did Not Even Consider the Issue of Lost Profits. Chemical suggests that a lengthy Rule 16 pre-trial conference occurred here, at which the District Court carefully considered a variety of matters, including the issue of the measure of damages for lost profits. This suggestion is completely false. Because the District Court was pressed for time (JA1599), the October 6, 1989 conference lasted a total of twenty minutes and there was no discussion at all of the issue of lost profits.

What actually occurred was as follows: On the eve of the conference, Chemical submitted a lengthy letter and asked the Court to treat the letter as a motion for summary judgment seeking dismissal of all petitioners' claims, a motion for a directed verdict as to all of petitioners' claims and a motion in limine striking all of its evidence. The massive motion was based on an 85-page brief containing 12 separate points, the 161-page joint pre-trial order, the deposition testimony of 17 witnesses and 35,000 documents.

At the October 6th conference, petitioners argued that the motion was made far too close to trial. They specifically asked whether they should brief it. The Court said, "No, you are not. Have your mind at rest." (A1599)

(emphasis added). It then stated, "[I]f you want to put in further briefs, we will talk about it on Wednesday [October 11]."

On October 11th, without permitting argument, the District Court began the conference by reading rulings which ended petitioners' case.

Chemical's claim that petitioners "submitted three further letters in response to the issues raised by Chemical's motion" (Chemical Brief at 8) is simply false. The letters Chemical refers to dealt with petitioners' position that summary judgment was improper without a full record and full compliance with Rule 56, and two issues specifically raised by the Court at the October 6th conference (JA1563, 1614, 1618). Petitioners did

not brief the 12 points raised in the motion -- including the damage issue -- based on the Court's explicit order not to do so.

Rule 16 calls "for a conference of counsel with the court to prepare for, not to avert, trial, leading to an order which shall recite the agreements made by the parties as to any of the matters considered." Padovani v. Bruchhausen, 293 F.2d 546, 548 (2d Cir. 1961). As Judge Clark, the principal draftsman of the Federal Rules stated in that case, Rule 16 was never intended to be a license to avoid the procedures governing disposition of a case on the merits. Id. at 548. Under no circumstances can the dismissal at issue here be trivialized into a routine exercise of the Court's powers under Rule 16.

4. The Contention that the Mandatory Requirements of Rule 56 Can Be Evaded by Characterizing a Dispositive Ruling as "In Limine" Conflicts with Decisions of the Third Circuit. No case decided by this Court or any Circuit Court has held that any dispositive motion can be granted without first hearing the non-moving party's response. Chemical nowhere provides any support for its claim that a party's case can be ended without first hearing that party.

Chemical's claim that the rulings were minor, evidentiary ones ignores the fact that the rulings had the effect of a summary judgment grant, and that Chemical itself had expressly said it was seeking summary judgment. The bank's assertion that it can present

a Chinese menu containing three possible labels for dismissing all of petitioners' claims and that, if the Court chooses the in limine label it does not have to comply with Rule 56, makes a mockery of that rule. Indeed, the District Court's own actions demonstrated that it was granting summary judgment. When the Court rejected petitioners' attempt to submit offers of proof (JA1692, 1828) -- which petitioners had an absolute right to do after in limine rulings -- it stated that there was no need for the filing of evidence since its rulings "did not rest upon the evidence to be adduced in support of those paragraphs" (JA1692) and that it had stricken petitioners' damage theory "as a matter of law" (JA1828).

The Second Circuit's affirmance here conflicts with Third Circuit decisions which hold that a District Court may not convert an in limine motion into one for summary judgment "without the procedural protections of notice which the federal rules require before judgment on the merits may be granted." Brobst v. Columbus Services International, 761 F.2d 148, 154 (3d Cir. 1985) (By granting summary judgment pursuant to a motion in limine that was based on other grounds, the District Court effectively precluded plaintiffs from marshalling the record evidence that it had already accumulated on this issue and pretermitted their filing affidavits of persons who might have been able to present competent evidence to show that there was at least a

genuine issue of material fact on this issue.); Bradley v. Pittsburgh Board of Education, 913 F.2d 1064, 1069 (3d Cir. 1990) (District Court's entry of summary judgment following hearings on motions in limine was improper because "the district court order bypassed the process established by Fed. R. Civ. P. 56 which requires 10 days notice in order that the nonmovant may marshall his or her evidence to show that there is a genuine issue of material fact"). Moreover, even assuming arguendo that the rulings were proper rulings in limine, a ruling in limine cannot be granted in the absence of an opportunity to be heard. In re Paoli Railroad, 916 F.2d at 854-55.

5. The Dismissal on the Eve of Trial Was the Culmination of a

Procedural History which Reflected Extreme Unfairness and Hostility Towards Petitioners' Claims. Under its Rules, this Court will consider granting a certiorari petition where a Circuit Court sanctions such a substantial departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. It would be hard to conceive of a clearer departure from the accepted and usual course of proceedings than the history of this action. For three years, the District Court entertained a total of seven successive dispositive motions without allowing petitioners to take any discovery. It granted each one of those motions, in large part based upon allegations by Chemical that petitioners

had failed to meet the kind of pre-1939 pleading requirements which the Federal Rules eliminated. After three years, the Court finally allowed the case to go forward based upon a truncated complaint. Thereafter, intensive, wide-ranging and costly discovery ensued for six months in this country and abroad. Ultimately, the pre-trial order was prepared, witnesses were scheduled, experts were retained and the case was ready for trial. On the eve of trial, when it became clear that the action would in fact be tried to a jury, the Court -- without even allowing petitioners to respond -- ended the case by granting yet an eighth dismissal motion based upon grounds Chemical had known about for over two years (JA414-17). The Court thereafter

refused to allow a factual record or offers of proof to be filed (JA1692, 1828). (Chemical's contention that the nature of petitioners' damage claim was not final until two days before its motion was made is false. While the amount of the claim may have varied, the fact that petitioners were seeking lost profits was known to Chemical for over two years (JA414-17)).

Far from being "routine", the procedural history here reflects consistent hostility by a District Court toward petitioners who were simply seeking to have a breach of contract case put before a jury. "[W]hen the shape of the playing field is not determined in advance, but altered by discretionary choices made by managerial judges . . . it is at least debatable

whether the essential conditions for procedural justice are satisfied." E. Donald Elliott, Managerial Judging and the Evolution of Procedure, 53 U. Chi. L. Rev. 306, 323 (1986).

It is basic that procedures must be applied fairly and neutrally, Brobst v. Columbus Services International, 761 F.2d 148, 154 (3d Cir. 1985), and not used as a means to discourage the prosecution of legitimate claims. Because this action constitutes a particularly extreme example of a growing and widely noted trend (see Petition, Point II), it presents an appropriate one for the exercise of this Court's supervisory powers.*

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* Chemical makes much of the fact that the Second Circuit's

(footnote continued)

6. Chemical's Contention That Petitioners Should Have Proceeded With An Expensive, Meaningless Trial Is Frivolous. Clearly, after the October 11th rulings precluded them from any recovery, petitioners were not required to go forward with an expensive, time-consuming and ultimately meaningless trial. See, e.g., Padovani,

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* (footnote continued)

explicit statement was that, in light of its ruling on the state law issue, the alleged procedural irregularities were "moot" rather than "harmless error." Mootness in the technical sense is "a non-existent controversy." DeFunis v. Odegaard, 416 U.S. 312 (1974). The more appropriate term is "harmless error." See Hayman v. Vaughn, No. 90-1875, slip op. (E.D. Pa. Dec. 7, 1990) (available on LEXIS, Genfed Lib., Dist. File on February 17, 1991).

293 F.2d at 548 ("There must be better ways to vindicate pre-trial orders than by superfluous and hopeless trials which can be only burdensome to the litigants and the court."). Moreover, both the District Court and the Court of Appeals treated the rulings as dispositive.

CONCLUSION

The petition for a writ of certiorari should be granted.

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